

ATTACHMENT C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.

Plaintiffs,

v.

FIRST DATA CORPORATION and CONCORD
EFS, INC.,

Defendants.

Civil Action No. 1:03CV02169 (RMC)

Filed: October 23, 2003

**DEFENDANTS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO CLARIFY SCHEDULING ORDER AND TO REQUIRE
SERVICE OF EXPERT REPORT OF DR. MARK A. ZMIJEWSKI BY NOVEMBER 26**

This Court ordered the parties to exchange expert reports on November 19, as plaintiffs had insisted, simultaneously and without regard for burdens of proof. Defendants had argued that reports should be staged, based on the parties' respective burdens of proof. The Court clarified that the simultaneous reports "shall contain all opinions held by the expert as of November 19, 2003 but need be based only on information in the possession of the respective party(ies) on or before October 23, 2003." Defendants complied with that Order, submitting three expert reports. Plaintiffs submitted one, from Dr. Janusz Ordover. Then, on November 21, plaintiffs served an Amended Witness List naming, for the first time, Dr. Mark A. Zmijewski, an expert accountant. This morning, plaintiffs disclosed that Dr. Zmijewski would testify regarding "efficiencies," purportedly in rebuttal.

Plaintiffs' failure to disclose Dr. Zmijewski or submit a report disclosing his opinions is contrary to this Court's Order. Plaintiffs had extensive information regarding efficiencies in their possession on or before October 23. Prior to October 23, Defendants presented the

government with expert opinions and factual analyses concerning the merger's expected efficiencies, provided backup documentation, voluntarily updated that information, and produced documents from the merger "integration team." Accordingly, this Court ordered them to disclose Dr. Zmijewski's opinions based on that information on and as of November 19. Plaintiffs' apparent position that Dr. Zmijewski's opinion is rebuttal misses the point and is contrary to their earlier arguments for simultaneous exchange. Plaintiffs bear the burden of proof (on all but the efficiencies defense), but defendants submitted extensive reports from two economists and an industry expert addressing the issues in plaintiffs' affirmative case. We could imagine the response had defendants claimed that Drs. Katz and Hausman could withhold their reports (on all but efficiencies) until December 1 because they would merely "rebut" Dr. Ordover.

Plaintiffs' violation of the Order they argued for is prejudicial. Its upshot would be that defendants would have no opportunity to discover the basis for Dr. Zmijewski's testimony until December 3.¹ This Court's Order of simultaneous exchange, we submit, was intended to prevent such late disclosure of critical information. Plaintiffs argued for that rule and should be held to it. Defendants respectfully request that plaintiffs be ordered to submit an expert report of Dr.

¹ Defendants voluntarily agreed to extend that date from December 1, due to the inadvertent late production of certain efficiency-related documents. Pursuant to this Court's direction, First Data spent some 250 hours of attorney time to identify and present to plaintiffs a complete table reconciling those late-produced documents with other, timely produced ones. More than 2/3 of the late-produced documents were duplicates of the previously produced documents.

Zmijewski disclosing his opinions as of today, based on information in plaintiffs' possession on October 23, by November 26.

Dated: November 24, 2003

FIRST DATA CORPORATION,

/s/

Geraldine M. Alexis, *pro hac vice*
Christopher B. Hockett, *pro hac vice*
Frank M. Hinman, *pro hac vice*
BINGHAM MCCUTCHEN LLP
THREE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111-4067
Telephone: 415.393.2000

Gerard Finn, DC Bar No. 448462
BINGHAM MCCUTCHEN LLP
1120 20TH STREET NW, SUITE 800
WASHINGTON, D.C. 20036
Telephone: 202.778.6155

Dated: November 24, 2003

CONCORD EFS., INC.,

/s/

Stephen R. Patton, *pro hac vice*
James H. Mutchnik, *pro hac vice*
KIRKLAND & ELLIS, LLP
200 E. Randolph
Chicago, IL 60601
Telephone: 312.861.2000

Mark L. Kovner, DC Bar No. 430431
KIRKLAND & ELLIS, LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Telephone: 202.879.5000